Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)–15 OF 2008(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
28 MAY 2009

Unincorporated Associations — Societies — Suits — Claim by members of club against management committee for breach of trust and fiduciary duties — Claim instituted by way of derivative action — Whether maintainable — Whether rule in Foss v Harbottle applicable — Whether Selangor Turf Club a legal entity

The Selangor Turf Club ('the club') is a registered society registered under s 7 of the Societies Act 1966 ('the Act') but is not a body corporate. The club was managed by a committee of members. The plaintiffs/appellants who were ordinary members of the club claimed that the committee had spent RM30m of the club's funds to purchase worthless shares in a troubled company without a track record. The plaintiffs commenced this action against the defendants who were committee members to obtain compensation and damages for the benefit of the club. The plaintiffs also cited as a defendant was the public officer of the club. This amounted to citing the club as a defendant. The plaintiffs professed to sue by way of a derivative action on behalf of all the members of the club except the defendant committee members. Six of the seven defendant committee members applied for the striking out of the plaintiffs' originating summons on the grounds that it was not a derivative action because the club, being an unincorporated association, was not a legal entity. The High Court dismissed the application. Upon the defendants' appeal, the Court of Appeal declined to strike out the action but ordered a substitution the effect of which, was to treat the plaintiffs' action as a representative action and not a derivative action. The plaintiffs' appealed against the entire decision of the Court of Appeal. The six defendants cross-appealed against the Court of Appeal's refusal to strike out the action. The plaintiffs were granted leave to appeal to the Federal Court on the question whether derivative proceedings could be instituted against a society.

Held, allowing the appeal:

(1) There was no reason why the club, being a registered society, could not

be held to be a legal entity as well. A society is a property-owning entity. Although the Act does not expressly provide for a registered society to act by agents, it has to act by agents, and the Act does envisage a registered society entering into contracts and incurring debts and liabilities. The fact that an unincorporated association is registered under statute is itself legal recognition of its legal existence (see para 27).

(2) The club was a legal entity and was therefore susceptible to the application of the rule in *Foss v Harbottle* (1843) 2 Hare 461 and the exceptions to it and therefore the plaintiffs' proceeding by way of a derivative action was in order. The question was therefore answered in the affirmative (see para 28).

[Bahasa Malaysia summary

Kelab Lumba Kuda Selangor ('kelab') merupakan pertubuhan berdaftar di bawah s 7 Akta Pertubuhan 1966 ('Akta'), tetapi bukannya sebuah badan korporat. Kelab tersebut diuruskan oleh sebuah jawatankuasa ahli-ahli. Plaintif-plaintif/perayu-perayu yang merupakan ahli biasa kelab tersebut mendakwa bahawa jawatankuasa tersebut telah membelanjakan RM30 juta dana kelab tersebut untuk membeli saham-saham yang tidak berharga dalam sebuah syarikat yang bermasalah tanpa rekod prestasi. Plaintif-plaintif memulakan tindakan ini terhadap defendan-defendan yang merupakan ahli jawatankuasa tersebut untuk mendapatkan pampasan dan ganti rugi bagi kepentingan kelab. Plaintif-plaintif yang disebut sebagai defendan merupakan pegawai awam kelab tersebut. Ini bermaksud kelab tersebut juga dianggap sebagai defendan. Plaintif-plaintif mendakwa untuk menyaman melalui tindakan terbitan bagi pihak semua ahli-ahli kelab kecuali ahli-ahli jawatankuasa defendan. Enam daripada tujuh ahli jawatankuasa tersebut memohon untuk membatalkan saman pemula plaintif-plaintif atas dasar bahawa ia bukanlah tindakan terbitan kerana kelab tersebut, sebagai pertubuhan bukan korporat, bukannya entiti undang-undang. Mahkamah Tinggi menolak permohonan tersebut. Atas rayuan defendan, Mahkamah Rayuan menolak untuk membatalkan tindakan tersebut tetapi mengarahkan satu penggantian yang membawa kesan, untuk menjadikan tindakan plaintif-plaintif sebagai tindakan perwakilan dan bukannya satu tindakan terbitan. Plaintif-plaintif merayu terhadap keseluruhan keputusan Mahkamah Rayuan. Keenam-enam defendan membuat rayuan balas terhadap keengganan Mahkamah Rayuan untuk membatalkan tindakan tersebut. Plaintif-plaintif diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan atas soalan sama ada prosiding terbitan boleh dimulakan terhadap sebuah pertubuhan.

Diputuskan, membenarkan rayuan:

(1) Tiada sebab kenapa kelab tersebut, sebagai pertubuhan berdaftar, tidak

A boleh diputuskan sebagai sebuah entiti undang-undang. Sebuah pertubuhan merupakan sebuah entiti yang memiliki harta. Walaupun Akta tidak secara tersurat mengadakan peruntukan bagi pertubuhan berdaftar untuk bertindak melalui ejen-ejen, ia perlu bertindak melalui ejen-ejen, dan Akta tidak menyatakan pertubuhan berdaftar untuk B menandatangani kontrak dan menanggung hutang dan liabiliti-liabiti. Fakta bahawa pertubuhan bukan korporat telah didaftarkan bawah statut dengan sendirinya merupakan pengiktirafan undang-undang terhadap kewujudannya secara sah (lihat perenggan 27).

C (2) Kelab tersebut merupakan sebuah entiti undang-undang dan dengan itu terikat kepada penggunaan peraturan di dalam *Foss v Harbottle* (1843) 2 Hare 461 dan pengecualiannya dan oleh itu, prosiding plaintif-plaintif melalui tindakan terbitan adalah menurut tertib. Oleh itu soalan tersebut dijawab positif (lihat perenggan 28).]

D **Notes**

For cases on suits, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2737–2738.

E **Cases referred to**

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Cotter v National Union of Seamen [1929] 2 Ch 58, CA (refd)

Currie v Barton, The Times, 12 February 1988 (not folld)

F *Edwards v Halliwell* [1950] 2 All ER 1064, CA (refd)

Foss v Harbottle (1843) 2 Hare 461 (refd)

Karting Club of Singapore v David Mak & Ors [1985] 2 MLJ 280; [1984–1985] SLR 447, HC (refd)

London Association for Protection of Trade & Anor v Greenlands, Limited [1916] G 2 AC 15, HL (refd)

MacDougall v Gardiner (1875) 1 Ch D 13, CA (refd)

Taylor v National Union of Mineworkers (Darbyshire Area) [1985] BCLC 237 (refd)

Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd H *& Ors and other appeals* [1996] 2 MLJ 265, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 12

Societies Act 1966 ss 7, 9(a), (b), (c), (e)(i), (ii), (f), (h), 17(1)(a), (b)

I Trade Union Act 1871 [UK] ss 8, 8A, 17(1)(b),17B(1)

Appeal from: Civil Appeal No W-02–1150 of 2006 (Court of Appeal, Putrajaya)

Tommy Thomas (Tommy Thomas) for the appellants.
V Sithambaram (CC Chong with him) (Sitham & Associates) for the respondents.

Abdul Aziz Mohamad FCJ:

[1] The Selangor Turf Club ('the club') is a registered society registered under s 7 of the Societies Act 1966 ('the Act'), but is not a body corporate. It has a set of rules, called Constitution and Rules ('the Rules'), which operates as a contract between the club and its members and between the members inter se. The club is managed by a committee of members. Rule 24(a) of the Rules provides as follows:

> All the funds and all the property of the club shall be vested in the Committee for the time being as Trustees for the Ordinary Members of the club and the Committee shall have control of such funds and property and they shall also have the entire management of the club and club property …

Although the expenditure of the funds of the club is in the hands of the committee, they are subject to the control of r 24(b) where a proposed expenditure exceeds RM500,000. They have first to comply with certain requirements that are contained in that rule.

[2] The plaintiffs (the appellants here) are ordinary members of the club. Contending, inter alia, that the committee had spent RM30m of the club's funds to purchase worthless shares in a troubled company without a track record, they brought an action by way of originating summons against seven committee members as defendants to, inter alia, obtain compensation and damages for the benefit of the club. Six of the seven defendants are the respondents here. The plaintiffs also cited as a defendant another member of the club who was registered by the Registrar of Societies as the public officer of the club in whose name, according to s 9(c) of the Act, the club 'may sue or be sued'. That amounted to citing the club as a defendant. The plaintiffs professed to sue by way of a derivative action on behalf of all the members of the club except the seven committee members. The plaintiffs' case was that the committee's wrongdoing was against the club. According to the rule in *Foss v Harbottle* (1843) 2 Hare 461, which originated in the sphere of company law, it was the club itself that had the right to sue. But to justify their resort to a derivative action as an exception to that rule, the plaintiffs said in their affidavit in support of their action that since the wrongdoers themselves were in control of the bringing of actions by the club, they would not allow proceedings to be brought by the club against themselves.

[3] Six of the seven defendant committee members applied for the striking out of the plaintiff's originating summons on the grounds that it was not a

derivative action because the club, being an unincorporated association, was not a legal entity. The High Court dismissed the application with costs. On the question whether the club was a legal entity, the learned judge held that that was not the issue and that the issue was whether the club could sue or be sued, which question the learned judge answered in the affirmative, by reason of s 9(c) of the Act, which I have referred to. The six defendants appealed to the Court of Appeal. The Court of Appeal construed what appeared to them to be the reliance by the plaintiffs on the *Raintree Club*'s case (*Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265) as an affirmation that their action was a representative action such as is provided for by O 15 r 12 of the Rules of the High Court 1980, and not a derivative action, and, being of the view 'that representative action is an answer to the instant appeal', declined to strike out the action but ordered a substitution the effect of which, to my understanding, was to let the plaintiffs' originating summons remain, but to be treated as a representative action and not a derivative action. The Court of Appeal ordered the parties to bear their own costs there and below. The plaintiffs' present appeal is against the entire decision of the Court of Appeal. Before us the six defendants concede that the Court of Appeal had misconstrued the plaintiffs' position and that the plaintiffs never conceded that their action was a representative action but instead had always wanted a derivative action and had always maintained that their action was rightly a derivative action. The six defendants have cross-appealed because they are dissatisfied with the Court of Appeal's refusal to strike out the originating summons and with the order as to costs.

[4] In para 29 of the written submission of the plaintiffs' counsel, Mr Tommy Thomas, the elements necessary for a derivative action are set out as follows:

(i) that the cause of action vests in a company or association of persons, that is, the proper plaintiff should be the company or association of persons; and

(ii) that the wrongdoers are in control of the management of the company or association of persons, and therefore will not permit the company or association of persons to become the plaintiff in an action against themselves as defendants.

Mr Tommy Thomas maintains, as regards element (i), that the cause of action in this case vests in the club because the RM30m that was allegedly misapplied belonged to the club.

[5] The defendants' counsel, Dato' V Sithambaram, agrees with the statement of the elements in the said para 24 except in one respect. He

maintains that the 'association of persons' mentioned in the statement must be a legal entity which must be an incorporated body, which the club is not, although it is an association of persons. He links to the argument that the club is not a legal entity the argument that the club does not own property and that what may appear to be the funds and property of the club, including the RM30m, belong to its ordinary members. Therefore the cause of action in this case does not belong to the club, but to the ordinary members. For the point of property ownership, he relies on r 24(a) of the Rules that I have cited and on that part of r 3 which provides that 'ordinary members shall have the right to share with other ordinary members in the property and assets of the club'.

[6] But for the contention that for the plaintiffs' action to properly be a derivative action, the club must be a legal entity, which the defendants contend it is not, the defendants do not question the manner in which the plaintiffs framed their originating summons as a derivative action, and, but for that contention, no issue arises on the said manner in this appeal. Nevertheless I feel that I ought to explain one or two aspects of it. Although the plaintiffs framed their action as on behalf of themselves and all the other members of the club other than the wrongdoers, that is as it should be in a derivative action, but the plaintiffs are not actually suing on their own behalf nor on behalf of the members generally, but on behalf of the club itself, to enforce rights *derived* from it. This is as is stated as regards companies at p 587 of *Modern Company Law* by LCB Gower (3rd Ed). That the club is also cited as a defendant through its public officer is in compliance with the requirement stated at p 540 of that book and by Gopal Sri Ram JCA in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 at p 427H. According to Dato' Sithambaram, in a derivative action the reason the company has to be joined as a defendant is so that any judgment will bind the company and it may enforce any orders made against the wrongdoer.

[7] The basis for the earlier-quoted statement in para 29 of Mr Tommy Thomas's written submission, which includes the term 'association of persons', is a passage, which mentions 'association of persons', in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 in which the import of the rule in *Foss v Harbottle* is set out, followed by certain exceptions to the rule, the exception appearing at the end of the passage being that which had given rise to the derivative action. Although, in speaking of that exception, 'association of persons' is not mentioned, I do not think that was a deliberate omission to exclude an association of persons from the application of the exception. The passage is as follows:

A The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.

The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

G A further exception was set out in the paragraph following that passage.

[8] Dato' Sithambaram's stand regarding the passage is that *Edwards v Halliwell* has no application to the present case. He gives two reasons. First, he says that the case is not about a derivative action. Secondly, he says that since the association involved in that case was a trade union, the 'association of persons' in the passage referred specifically to a trade union.

[9] In *Edwards v Halliwell*, a delegate meeting of a registered trade union purported to increase the regular contributions of employed members without complying with r 19 of the Union's Rules. The plaintiffs, two members of a branch of the union, sued on behalf of themselves and all other members of the branch for a declaration that the purported increase was invalid. The defendants were two members of the executive committee of the union, sued on behalf of themselves and all other members of the executive

committee. The union itself was joined as a defendant. Apart from the point of construction of r 19, which was construed against the defendants, the defendants presented two arguments, namely, first, that the failure to comply with r 19 was a mere irregularity in form in the conduct of the domestic affairs of the union and the court should not, as a rule, interfere with such conduct on the ground of such irregularity, and, secondly, that the action was constituted contrary to the rule in *Foss v Harbottle*, because the union was not a plaintiff. Jenkins LJ's judgment dealt only with those two arguments. He rejected the first argument about internal management of domestic affairs, after which he addressed the argument about the rule in *Foss v Harbottle* and he began with the passage that I have set out, where he set out the rule and certain exceptions to it and concluded that those exceptions, including the exception that had given rise to the derivative action, were not directly in point in the case. After the passage, he dealt with a further exception to the rule which he found exactly fitted the case. He went further and stated that the case did not even fall within the general ambit of the rule because the wrong complained of by the plaintiffs was not a wrong done to the union but to the individual members, who were suing, not in the right of the union, but in their own right.

[10] It is true, therefore, that *Edwards v Halliwell* was not about a derivative action, but the passage relied on by Mr Tommy Thomas contains what Vinelott J, in *Taylor v National Union of Mineworkers (Darbyshire Area)* [1985] BCLC 237, at the bottom of p 242, described as 'a classic exposition of the rule in *Foss v Harbottle*, which is often cited', an exposition which Jenkins LJ thought fit to make prefatory to addressing the defendants' argument in reliance on the rule and in which he included 'association of persons' and spoke of the exception that had given rise to the derivative action. And I do not think that by 'association of persons' Jenkins LJ intended to refer specifically to only a trade union. If he had so intended he would have said 'trade union'. I think that he named an association of persons advisedly as referring to registered trade unions and other associations of persons.

[11] Dato' Sithambaram's insistence on the involvement of a legal entity for an action to properly be a derivative action would appear to be based on the following passage in *Zuckerman on Civil Procedure, Principles of Practice* (2nd Ed) at p 513:

> As a matter of general principle, it is for a company or any other incorporated body, acting through its properly appointed officers and directors, to decide whether or not to sue and no one else can sue on its behalf. The derivative claim procedure under CPR 19.9 is designed for situations where a company, any other incorporated body, or trade union is alleged to be entitled to claim a remedy but

A declines to pursue it. In such situations, one or more members of the company, body or trade union may bring an action to enforce the remedy to which the legal entity is entitled (a 'derivative claim')…

It will be noticed that 'legal entity' in the last sentence is a common term that refers to three types of entity: a company, any other incorporated body, and a trade union.

[12] On top of his argument that relies on the passage from *Edwards v Halliwell* that I have cited, Mr Tommy Thomas argues – and I am stating, simply, what I perceive the ultimate effect of the argument to be – that if under English law a registered trade union, which is an unincorporated association, is recognized as a legal entity for the application of the derivative action device, so should a registered society in Malaysia, which the club is, even though it is an unincorporated association. Dato' Sithambaram's ultimate answer to that argument is that, unlike a registered society in Malaysia, a registered trade union in England enjoys a quasi-corporate status because it is capable of suing and being sued in its own name, whereas a registered society is not, and a registered trade union is the beneficial owner of the property of the trade union, whereas a registered society is not. Before I proceed to consider whether Dato' Sithambaram is right in his perception that those are the reasons why a registered trade union in England enjoys what he terms a quasi-corporate status, I think it expedient that I set out the provisions of the Act concerning the right and liability of a registered society to sue and be sued and its position as regards the holding of property.

[13] As to the right to sue and liability to be used, according to s 9(c) of the Act a society may sue or be sued in the name of the member who is its registered public officer or, if there is no registered public officer, in the name of an office-bearer of the society. The person in whose name the society sues or is sued is stated in s 9(e)(ii) as suing or being sued 'on behalf of the society'. This means that although the suit is not in the society's name, it is still a suit by or against the society, but through its agent. This is further borne out by the fact that s 9(e)(i) and (ii) emphasises that where a suit against a registered society succeeds, the judgment is enforced not against the person or the property of the person in whose name the society is sued but 'against the property of the society', which fact in turn signifies that a society is recognised as a property-owning entity, as is also the fact that where a registered society sues a member and loses, according to the proviso to s 9(f) the successful member may recover his costs either from the person in whose name the society sues or from the society itself, in which case the successful member may have execution 'against the property of the society'.

[14] References to the property or funds of a registered society exist in other part of the Act. Section 9(a) envisages 'the movable property of a

society' being vested in trustees without expressing for whom the trustees hold the property, but provides that if it is not so vested it 'shall be deemed to be vested for the time being in the governing body of the society'. Section 9(b) envisages 'the immovable property of a society' being registered in the names of trustees without expressing for whom the trustees hold the property, but provides that if it is not so registered, it may, notwithstanding any written law to the contrary, 'be registered in the name of the society' itself. Section 9(b) also envisages a society to be having a seal and likens it to a 'registered proprietor' of the registered property, whether it is registered in the name of trustees or in the name of the society itself, because the section provides that all instruments relating to the property should be as valid and effective as if they had been executed by a registered proprietor if executed by three proper office-bearers of the society and sealed with the seal of the society. Since an immovable property of the society may be registered in the name of the society itself if not registered in the names of trustees, where it is registered in the names of trustees the trustees must be holding for the registered society. So must the trustees or governing body in whom the movable property of the society is vested, and although, in the case of movable property vested in the governing body, s 9(a) provides that in all proceedings civil or criminal the property 'may be described as the property of the governing body', that is only a matter of description for the purposes of the proceedings.

[15] With all those incidents attaching to a registered society, I do not find it possible to conclude that a registered society is not a legal entity or that the funds or property of the society do not in law belong to the society. In my opinion references in the Act to the funds or property of a registered society are not merely a convenient manner of identifying or describing property that does not in law belong to the society but belongs to the members, but those references actually mean what they say and reflect a recognition that in law the property belongs to the society.

[16] As far as concerns the vesting aspect of the funds and property of the club, r 24(a) of the Rules is consistent with s 9(a) and (b) of the Act. But where the rule speaks of the committee 'as Trustees for the Ordinary Members of the club', and when r 3 speaks of ordinary members having the right 'to share with other Ordinary Members in the property and assets of the club', I am of opinion that those rules are looking to the day when the registered society that the club is, is dissolved, or when its registration is cancelled. When a registered society is dissolved, s 9(h) requires that 'all necessary steps shall be taken for the disposal and settlement of the property of such society, its claims and liabilities, according to the rules (if any) of the said society applicable thereto'. When the registration of a registered society is cancelled, s 17(1)(a), (b) provides, inter alia, that the property of the society shall vest in the Director General of Insolvency who 'shall proceed to wind

up the affairs of the society, and after satisfying and providing for all debts and liabilities of the society and the costs of the winding up shall pay the surplus assets, if any, of the society … to members of the society according to the rules of the society …'. I should think that, in the case of dissolution, that is also what happens to the surplus assets of a society, in consequence of the steps that s 9(h) requires to be taken.

[17] It is, therefore, only after dissolution or cancellation of registration that the property of a registered society becomes the property of the individual members, and even then only to the extent of surplus assets. Until then no member can claim that the property of the society is his. It is legally the property of the society. The members may be the ultimate beneficial owners of the property, but the present beneficial and legal owner is the society.

[18] I revert now to Dato' Sithambaram's contention that a registered trade union is treated under English law as a legal entity because it has some of the attributes of a corporate personality, namely, it is capable of suing and being sued in its own name and it is capable of holding property in its own name as beneficial owner. He bases his contention on a small passage in *Cotter v National Union of Seamen* [1929] 2 Ch 58. But I think it is necessary to give the case a wider look.

[19] For a summary of *Cotter*'s case, I need only quote what Vinelott J said in *Taylor*'s case, at pp 241 and 242:

> In *Cotter*'s case the plaintiffs, members of the union, commenced proceedings to restrain the union and its officers from making an interest-free loan of £10,000 to the Miners' Non-Political Movement and for a declaration that a special general meeting had been invalidly convened and that a resolution of that meeting to make the loan was accordingly invalid. It was held by Romer J and the Court of Appeal that it was within the power of the union to make the £10,000 loan, that an irregularity in calling the meeting and in passing the resolution could be cured by a confirmatory resolution passed at a meeting properly convened, and that in those circumstances the plaintiffs as a minority of the union were not entitled to sue on behalf of the union. Thus the court applied to the union the principle known to company lawyers as the rule in *Foss v Harbottle* (1843) 2 Hare 461.

The union, the National Union of Seamen, was a registered trade union under the Trade Union Act 1871. The aspect of the rule in *Foss v Harbottle* that featured in *Cotter*'s case was the second aspect mentioned by Jenkins LJ in *Edwards v Halliwell* after the word 'Secondly' in the passage that I have set out, which is the aspect that was explained by Mellish LJ in *MacDougall v Gardiner* (1875) 1 Ch D 13.

[20] In the Court of Appeal, the unsuccessful plaintiffs, by their counsel, Sir Henry Slesser, strenuously argued against the application of the rule, using the property-ownership argument. Lord Hanworth MR put the argument and dealt with it at pp 102–104 as follows:

> It has been argued, and forcibly argued, by Sir Henry Slesser that no case has yet decided that the principle of *Foss v Harbottle* can be applied to a trade union. It is said that a trade union is of a nature different from that of an incorporated company, and that the doctrine does not apply to trade unions. The nature of trade unions, he says, is to be found by reference to s 8 of the Trade Union Act 1871, which provides that: 'All real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such trade union and the members thereof.' Considering those words very closely, he points out that the phrase used is not merely the 'benefit of such trade union,' but also the 'benefit of the members thereof.' The individuality, therefore, of the members composing the trade union, he says, is not lost sight of; they are not, he contends, co-operators; they have individual rights, although for certain purposes under the Act of 1871 trade unions were made legal and were given certain rights and privileges before the law. It appears to me that this point is really governed by authority—if not in terms, at any rate in reason—when the principle is considered, What are trade unions? Lord Lindley said in the *Taff Vale*'s case [1901] AC 426 at p 444, referring to s 8, which I have read: 'The property so held is, however, the property of the union: the union is the beneficial owner'; and Farwell J (as he then was), in his judgment, which was definitely accepted in the House of Lords, said (*Ibid* at p 429): 'Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the courts according to the intention of the Legislature.' I need not refer to other passages to which our attention has been called, but I will read a passage from the judgment of Farwell LJ in the *Osborne*'s case [1909] 1 Ch 163 at p 191, where he says: 'A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents.' With those passages before us it appears to me clear that we must treat a registered trade union as a legal entity — a legal entity which holds the property, no doubt, for the trusts, as pointed out by Lord Lindley, but still a legal entity which can work through its agents and is governed by the code which is contained in its registered rules. If that be so, there is no reason which would prevent the application of the doctrine laid down in *MacDougall v Gardiner*. Its entity is to be controlled, and is controlled by action taken under its rules, with the result that in the present case, if some irregularity has been committed, it would be quite possible for the legal entity, by means of further meetings, further notices, and the like, to make regular what apparently, or what it is argued, is irregular, and

reason and good sense would certainly dictate that the principle which applies to the entities of incorporated companies should also apply to entities created by registration under the Trade Union Acts.

The passage relied on by Dato' Sithambaram is the long sentence towards the end of the passage, beginning with the words 'With those passages before us'.

[21] It is to be noted that, in *Cotter*'s case, the plaintiffs' argument of individuality and individual rights of members, based on the fact that s 8 of the Trade Union Act 1871 provided that the property of a registered trade union was vested in trustees also for the benefit of members, was rejected in favour of reliance on authority governing the point 'if not in terms, at any rate in reason'. Farwell J (later LJ) in the *Taff Vale* and *Osborne*'s cases was the principal authority. In those cases Farwell J (LJ) focused on the fact that the Legislature had legalized a non-partnership unincorporated association of individuals and given it the capacity 'for owning property and acting by agents', with the 'necessary correlative of liability', thus creating an 'anomalous' kind of 'statutory legal entity'. After considering Farwell J (LJ), Lord Hanworth MR clearly saw that a registered trade union must be treated as a legal entity. As far as Lord Hanworth MR was concerned, it was not so very important for whom the property of a registered trade union was held. What was important was that it 'can work through its agents and is governed by the code which is contained in its registered rules'. The question of the name in which a registered trade union could sue or be sued did not come into consideration at all.

[22] If, with the considerations that influenced Farwell J (LJ) and Lord Hanworth MR, a registered trade union was treated as a legal entity, I can see no reason why the club, being a registered society, cannot be held to be a legal entity as well. As I said, a society is a property-owning entity. The club is governed by rules. Although the Act does not expressly provide for a registered society to act by agents, it has to act by agents, and the Act does envisage a registered society entering into contracts and incurring debts and liabilities. Section 8A, for example, speaks of contracts entered into by a branch of a registered society. If a branch could enter into contracts, so could the registered society itself. Debts and liabilities are mentioned, for example, in ss 17(1)(b) and 17B(1). To enter into contracts, a registered society would have to act by agents. So also to enter into transactions resulting in debts and liabilities.

[23] Actually, judging from the passage in the judgment of Lord Hanworth MR that I have cited, it would appear that in *Cotter*'s case the only ground that the plaintiff had for contending that the registered trade union, although given statutory recognition by the 1871 Act, was not a legal entity to which the rule in *Foss v Harbottle* could apply would appear to be the ground of

individuality of members and their individual rights. While Lord Hanworth MR rejected that argument in favour of following authority, Lawrence LJ dealt specifically with that argument, and found that it was not well founded, in the following passage at pp 108 and 109:

> … It is contended by Sir Henry Slesser that the fact that the property of the union is vested in trustees, who by s 8 are declared to be trustees not only for the union, but also for the members thereof, prevents the application of the rule. He put it as high as this, that under that section the trustees are trustees of the property for the individual members of the union, and that the trustees are not entitled to part or deal with the trust property if any single member objects, unless it is shown that the letter of the rules has been strictly complied with; and if there be any irregularity in summoning or holding a meeting the trustees cannot properly act upon a resolution passed at that meeting, unless they first obtain the consent of every member of the union. In my judgment that contention is not well founded. It has been held that the property of the union is vested in the trustees for the benefit of the union and not for the benefit of the individual members in the sense contended for. Lord Lindley, in the *Taff Vale* case, said: 'The property so held is, however, the property of the union: the union is the beneficial owner.' What the position might be where the union is not registered under the Act need not be considered, because I agree with what has been said during the argument by my colleagues that such a case would depend upon an investigation of the rules of the union concerned. Here we have the case of a union which is registered and is the primary beneficiary of the trust created by s 8 of the Act. Whatever may be the effect of the addition of the words 'and the members thereof' in the section, the crucial fact remains that the disposal of the property is, in the present case, in the hands of the executive council or in the hands of the majority of the members assembled in general meeting, and I cannot find anything in the Acts or in the constitution of this union to prevent the application of the rule in *Foss v Harbottle*.

[24] It is to be noted that, in *Cotter*'s case, the plaintiffs' argument as to individuality of members went so high as to contend that, unless the rules had been strictly complied with, the property vested in trustees could not be dealt with by them 'if any single member objects'. This was the sense in which the plaintiffs construed the individual rights of members. But Lawrence LJ rejected the contention as not well founded, apparently agreeing with what had been held elsewhere, namely — and this is important —'that the property of the union is vested in the trustees for benefit of the union and not for the benefit of the individual members in the sense contended for'. It might be held also for the benefit of the individual members, but not in the sense contended for. That is because, as stated at the end of the passage, the disposal of the property 'is in the hands of the executive council' — in our case, the committee —'or in the hands of the majority of the members assembled in general meeting'.

[25] As has been seen, although a registered society is not an incorporated

association, the Act enables it to sue and be sued, but in the name of its public officer or an office-bearer, not in its own name. There appears to be a suggestion in para 31 of Dato' Sithambaram's written submission that the fact that a registered society cannot sue in its own name is 'statutory recognition of the fact … that (the registered society)… has no legal entity of its own' or, in other words, that fact is statutory proof that a registered society is not a legal entity. I do not see a rationale for not allowing a registered society, having the features that I have mentioned, including the right and liability to sue and be sued, to be recognised as a legal entity merely for the fact that it cannot sue and be sued in its name.

[26] The authority relied on by Dato' Sithambaram for the aforesaid suggestion, *Karting Club of Singapore v David Mak & Ors* [1985] 2 MLJ 280, does not justify it. In that case, Chua J said of a 'member club registered with the Registrar of Societies': 'The Karting Club of Singapore is unincorporated and consequently cannot be made a plaintiff to this action'. The learned judge did not state whether, under the statute governing it, the club could sue and, if it could, in whose name it could. The judgment simply proceeded on the basis that an unincorporated association could not sue at all, as is borne out by the fact that the statement was made in reliance on *London Association for Protection of Trade & Anor v Greenlands, Limited* [1916] 2 AC 15, where Lord Buckmaster LC, speaking of one of the defendants, an unincorporated association that was not one recognised by statute like a trade union or like a registered society in Malaysia, said at p 20: 'it was unincorporated and consequently could not be made a defendant to the action in any capacity whatever'. *The Karting Club* and the *London Association* cases were simply not cases that dealt with the point that while an unincorporated association recognised by statute, like the club in the present case, is given a right to sue, it cannot sue in its name, or that provided a rationale for the restriction.

[27] Finally, I have to dispose of Dato' Sithambaram's submission that the club being an unincorporated association, it is not recognised as having any legal existence apart from the members of which it is composed. The submission relies on what O'Connor LJ said in *Currie v Barton* The Times, 12 February 1988, as quoted at p 2 of *Unincorporated Associations: Law and Practice* by Jean Warburton (2nd Ed), as follows:

> Clubs are also unincorporated associations. That phrase in English law means that the law does not recognise the legal existence of this enormous number of organisations which operate in this country in a wide variety of fields.

That statement, however, is about clubs and other unincorporated associations as existing under the common law and ungoverned by statute. It does not apply to unincorporated associations that are governed by statute,

such as trade unions in England and Malaysia and registered societies in Malaysia. At p 3 of the book the learned author says this:

> There is no statute law specifically dealing with unincorporated associations. The general law relating to unincorporated associations is judge made. There has, however, been statutory intervention in relation to certain types of unincorporated associations, for example, trade unions, to alleviate the difficulties caused by the lack of legal status.

The fact that an unincorporated association is registered under statute is itself legal recognition of its legal existence.

[28] In conclusion, the club is, in my judgment, a legal entity and is therefore susceptible to the application of the rule in *Foss v Harbottle* and the exceptions to it and therefore the plaintiffs' proceeding by way of a derivative action is in order.

[29] The questions on which the plaintiffs were granted leave to appeal to this court are the following:

(1) Whether derivative proceedings can be instituted against a society registered under the Societies Act 1966 by suing it in the name of its public officer registered pursuant to s 9(c) thereof; and

(2) Whether it is proper for a court to set aside a derivative action and substitute it as a representative action in circumstances where the plaintiffs/applicants do not wish it.

[30] Dato' Sithambaram submits that the first question is misconceived because the plaintiffs' action is not one against the club but is against its committee members. That is true, but I think that the question is focusing on the technical rule, that I have referred to, that in a derivative action the entity to which the wrong is alleged to have been done must also be added as a defendant. The question is clearly inadequate, but such as it is, my answer is in the affirmative. What is more important, however, is the conclusion that I have just announced.

[31] With that conclusion, I would allow the appeal, uphold the orders of the High Court and set aside the orders of the Court of Appeal. With that, the second leave-question becomes academic. But I will say a few words about it. That the Court of Appeal upheld the action as a representative action was due to a misconception that the plaintiffs accepted that it was a representative action. Had it not been for the misconception, that is, had the Court of Appeal appreciated that the plaintiffs were insisting that theirs was a derivative action and did not wish it to be a representative action, and had the

A Court of Appeal found against derivative action, I should think that they would have dismissed the action without doing the substitution.

[32] I would also order costs for the plaintiffs here and in the Court of Appeal and order that the deposit be returned to them.

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[33] My learned brother, Richard Malanjum Chief Judge, Sabah and Sarawak, and Hashim Yusoff FCJ, have read this judgment in draft and have indicated their agreement with what I have said.

C *Appeal allowed.*

Reported by Kanesh Sundrum

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